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Human rights and Latin American Southern voices

Oscar Guardiola-Rivera

1. Is law ethnocentric?

Recognized as a master in the emerging discipline of comparative jurisprudence, which he helped to create, William Twining set out to write about law and institutions from a truly global perspective. This meant resisting the urge to assume that it is possible to continue doing sound work in legal theory, or the philosophy and sociology of rights and institutions, solely from within Western traditions.

The standpoint of Western legal–political traditions vis-à-vis other practices of law and the political ontologies of the world remains unclear. All too often, Western law and politics presents themselves not only as one among various ways of regulating human relations, but also as the unique representative of human regulation. That is, as being the one that measures and defines all the multitude of normative ways in the world, having the capacity to travel everywhere and be more or less universally applicable. Twining's lesson challenged such facile representations. He argued that to accept the profoundly influential character of the rich heritage of Western legality and socio-political theory did not mean having to deny that, from a global standpoint, academic law

and practice appear to be ‘generally parochial, narrowly focused and even unempirical’¹ The canon and heritage of Western jurisprudence and social-political theory not only appear narrow and parochial when viewed from a global perspective, but they also, as Twining sharply observed, ‘tend ... towards ethnocentrism’.²

What does it mean to say that Western law tends towards Eurocentrism and ethnocentrism? A tendency is an inclination towards a particular type of behaviour; a proclivity or predisposition. Building upon Twining’s insight I am going to argue in this paper that what predisposes the canon and heritage of Western jurisprudence and socio-political theory towards the particular (i.e. ethnocentrism, Eurocentrism) is not its claim towards universality. Rather, it is the specific form of unity and uniqueness assumed by Western law that predisposes it towards a particular ethnocentric behaviour. Western law is seen not as one element among others in the set of humanity’s normative ways, but as the one that defines and measures what counts as part of the set, as the very standard of humanity: an understanding which it projects upon the other peoples it encounters around the world.

The intersection opened up by the convergence between law and anthropology is a good place to search for instances of such an inclination, to criticize them, and in the process to try to recover the standpoint of a more universal view of nature and the human. Twining’s position, second to none

¹ W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009).

² W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009) xi. See also *Human Rights, Southern Voices* (2009) 1–3.

within Western Anglo-Saxon jurisprudence and socio-political philosophy, is a powerful example of the ways in which the empirical and comparative study of ontologies and normative cosmologies – pioneered by anthropology – has challenged, even subverted, Western legal protocols and assumptions about what counts as human, as well as its own standpoint as the one and true representative of such a standard.

Such protocols and assumptions about the unity of mankind, and the moral importance of one's location on the planet vis-à-vis others, were derived from Christianized Greek metaphysics. They were then applied to the definition of the human in the sublunary, worldly or 'secular' realm by the sixteenth-century jurists and theologians who helped to determine the modern cosmopolitan framework in the wake of the 1550 debates in Valladolid, Spain. Such debates considered the consequences of the encounter between Europeans and Amerindians, and in particular the validity of European claims towards global hegemony. In the process, these jurists and theologians, and their successors in the Netherlands and elsewhere in Europe, invented human geography, geopolitics and modern international law.³ Sixteenth-century jurists, navigators, cosmographers and theologians determined the cosmopolitical perspective, as well as its basic assumptions concerning the unity of the many beings, peoples and landscapes of the world. This proved influential, indeed

³ For the sixteenth-century roots of modern law, specifically international and cosmopolitan law, see P. Fitzpatrick, 'Latin Roots: The Force of International Law as Event' and O. Guardiola-Rivera, 'Absolute Contingency and the Prescriptive Force of International Law, Chiapas-Valladolid, ca. 1550' in *Events: The Force of International Law*, F. Johns, R. Joyce and S. Pahuja (eds), with a foreword by M. Koskeniemi (Routledge-Cavendish, 2010), [ch. 3](#) and [4](#).

quite decisive, in the specific setting of global colonization and empire by European powers. Often taken for granted in mainstream Western legal and social-political theory, such a perspective has been the subject of sustained criticism. This has emerged not only within contemporary anthropology but also in the inter-disciplinary forms of comparativism and legal anthropology practiced by realists in the Americas and elsewhere. In this respect, at least, Twining has proven to be a worthy successor of Bronislaw Malinowski's *Crime and Custom in Savage Society*, Karl Lewellyn and E. Adamson-Hoebel's *The Cheyenne Way*, the more contemporary *The Life of the Law* by Laura Nader, and, more generally, the intellectual attitude exemplified by Claude Lévi-Strauss's classic *Tristes Tropiques*.

In *Tristes Tropiques*, Lévi-Strauss told a story about the 'absolute, total and intransigent dilemmas by which the men of the sixteenth century felt themselves to be faced', which is thoroughly apposite to the question concerning the tendencies toward ethnocentrism present in Western law from its very inception in early modernity.⁴ According to Lévi-Strauss, 'commission after commission was sent out to determine the nature' of the inhabitants of the New World. In the course of what was tantamount to a psycho-sociological inquiry, 'conceived according to the most modern standards', the colonists were required to answer a series of questions, says Lévi-Strauss, 'the purpose of which was to find out if, in their opinion, the Indians were or were not' capable of living like Castilian peasants – that is, crucially, like autonomous economic agents. 'All the replies were negative', the anthropologist tells us. The Amerindians refused to

⁴ C. Lévi-Strauss, *Tristes Tropiques* (Penguin Modern Classics, 2011) [1955] 75 ff.

work in accordance with the economic imperatives of the time. They carried perversity 'to the point of giving away their possessions'. The alleged lack of a work ethic similar to that of Protestants and counter-reformist Catholics, and the apparent absence of notions of private property, were just the tip of the iceberg. According to the sociological inquiry carried out by these thoroughly modern commissions, the aborigines 'eat human flesh, and have no form of justice'.⁵

The point is clear: for these fact-finding commissions, composed of jurists and Christian theologians who followed the protocols of what we now call the social sciences, Amerindians had no 'law' and were either outside of humanity or occupied a lower place in its internal moral hierarchy, being a less perfect, unrealized form of the human. This was evidenced by their practices: their refusal to enjoy without sharing; their symbolic practices concerning the righting of communal wrongs and the treatment of prisoners captured in warfare; and most of all their refusal to hold any belief concerning the unity of God, King and Law. Muslims may hold the wrong beliefs, observed the Christian jurists and theologians doing their fieldwork in the Americas from the sixteenth century onwards, but in comparison to Amerindians at least they showed constancy in their beliefs.

Jurists and Christians theologians, as well as their more liberal successors, either ignored or disavowed the ways in which the Amerindians' refusal to believe, accumulate or to conquer evil by externalizing it in a figure of absolute enmity (captives, even those intended for execution, would be given wives and spend years as members of the community) were linked to Amerindian demands

⁵ C. Lévi-Strauss, *Tristes Tropiques*, 75–6.

for reciprocity between human groups (extended in some cases to nonhumans). In this respect, what the proto-sociologists and jurists of the sixteenth century missed was the emergence of the rule as rule in the context of gift-economies rather than exchange-economies, the recognition of which required the ability to assume the existence of an alternative viewpoint. Due to their intransigent focus on a specific form of unity (setting constant and faithful belief in God, the Sovereign and his Law, whether excessive or moderate, as the unique standard of humanity) our thoroughly modern jurists and sociologists were blind to alternative viewpoints.

Arguably, mainstream practices of Western law, although nominally secular, continue to be obsessed by a specific form of unity that is derived from its roots in Western Christian theology: whether one believes too much or too little still serves as a unique indicator of the place one occupies in the hierarchy of humanity. Belief is a standard. One is set apart from all others in the globe, in the very act of defining and measuring such others against the constancy of belief as a unique standard of humanity. Consider, for instance, the focus of security laws and 'responsibility' doctrines. These hijack the universalist impulse of human rights law at home and abroad in the service of particularist views concerning the alleged threat posed by foreign immigrants and cultures, all too often identified as 'fundamentalist' enemies, to the allegedly weak, moderate, liberal polities of the Judeo-Christian West. The framework of such laws and doctrines is the alleged struggle between those who believe too much and cannot make their specific religion a private affair and those who believe too little and manage to privatize belief. In principle, there is no space for questioning this

basic framework that separates the peoples of the world between religious privatizers and fundamentalists, or to consider the challenge posed to it by the existence of religions without belief such as those observed among pre-Columbian Amerindians. If the spectre of possibilities that frames current emphases on security laws and responsibility doctrines at home and abroad runs from too much belief, exemplified by the alleged fanaticism of Eastern law, to too little belief in the case of liberal Western law, then it turns out that the former has no monopoly over religious inspiration. Western law too has never been secular.

The story about the modern, constant, sovereign subject that Western commissioners expected but failed to find among Amerindians is also a story about how this subject is able to privatize religion and belief, rather than prevail over it. With religion neutralized and relegated to the inner sanctum of constant, isolated subjectivity, the question arises: what will replace the fading social bond? What can now gather us in a disenchanted, technocratic world without moral virtues? This was the problematic question that law inherited from the work of sociologists Emile Durkheim and Max Weber after the crises of the 1930s and World War II, taken up by such leading figures as H. L. A. Hart, whose lectures Twining attended at Oxford.⁶

The more globalized and disenchanted the world became, 'the more society sought solace and refuge in religion and religious movements', which sought an answer to the thin morality of 'secular' modern societies in the thick,

⁶ See N. Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2006).

strong and constant unity of belief in God, King, and Law.⁷ Normative accounts informed by political theology have continued to haunt ‘the epistemic certitude and assurances of sociology, and western society’, and thus, also, of sociologically-minded Western understandings of law and normativity. This is so ‘not because religion is a historical and developmental vestigial order that modern society cannot digest, but precisely because religions remain as modern as contemporary society’.⁸

This insight is important in order to provide an answer to our question concerning Western law’s ethnocentric tendencies – part and parcel of the project of modernity as an imperial and colonial project – referred to by Twining. More specifically, there are two tendencies that converge within Western law as part of the project of modernity: an imperial propensity to externalize evil, on the one side, and the legal, institutional use of religion as a normative political technology that determines as much the horizon of the social as the horizon of the subjective. In particular, religion as a normative technology contributes decisively in the production and inscription of certain types of subjectivity, the incorporation of the other into ourselves.

It is at this point that the insights of anthropology deploy their most radical and critical force within Western academic law. For it turns out that modern concerns with the cannibalistic practices of Amerindian others were in part a mirror of the religious wars of seventeenth-century Europe, focused on

⁷ E. Mendieta, ‘Imperial Somatics and Genealogies of Religion: How We Never Became Secular’ in *Postcolonial Philosophy of Religion*, P. Bilimoria and A. B. Irvine (eds), (Springer Science+ Business Media B. V. 2009), 231–246, at 233.

⁸ Ibid.

rival understandings of the Eucharist.⁹ Such externalization of internal conflicts upon evil others in the seventeenth century is arguably of the same kind as the externalization upon fundamentalist religious others of our internal concerns with immigration in the current era of globalization. But religion as a normative, political, modern and colonial technology also concerns the making visible of the constant, temperate soul – of enlightened human natures – against the darkness of bodies in the torrid zones of the world. As Mendieta argues, in such technical procedure of the inscription of subjects to law, ‘the skin confesses the soul’.¹⁰

Modern Western law remains haunted by a singular experience of religion, as evidenced by its deployment of a particular technology of subjective inscription: one that tends to allow for the externalization of internal conflicts about the consequences of too little belief in society, by projecting them upon monstrous others who threaten us because they believe too much – from sixteenth-century cannibals to twenty-first-century immigrants as well as fundamentalist religious or political fanatics. Immigrants and religious or political fanatics are represented to modern audiences through mass media as

⁹ Hans Staden, *Hans Staden's True History: An Account of Cannibal Captivity in Brazil*, trans. N. L. Whitehead and M. Harbsmeier (Duke University Press, 2008), Introduction, xv.

¹⁰ E. Mendieta, ‘Imperial Somatics and Genealogies of Religion: How We Never Became Secular’, 239. Mendieta is talking here about ethnography and genealogy, methodologies that developed their explanatory force in the fields of anthropology and history. He says: ‘Genealogy allows us to understand how is it that the soul is the prison of the body, and how is it that the skin confesses the soul, in such a way that the skin and the body always betray the truths that constitute us as subjects.’ See also his ‘Geography Is to History as Woman Is to Man: Kant on sex, Race, and Geography’ in *Reading Kant's Geography*, S. Elden and E. Mendieta (eds), (SUNY Press, 2011), 345–68.

monstrous others with which no relationship, other than force, is possible; their darker intentions reveal the vulnerability and weakness of liberal societies without strong moral values.

The implication is that to make the truth of our liberal values count over the superstitious beliefs of others in darker places left behind by the march of history, moderate values must be strengthened – become less moderate and tolerant – and even forcibly imposed. And if our moderate values can be imposed, that is because these ‘others’ are culturally backward, incapable of true meaning and are meaningless instead.

Let’s understand by ‘otherness’ or ‘alterity’ something more essential and concrete: the universal condition for reciprocity. In such a condition, others aren’t just the obscure object of our desires, sympathy or antipathy, but have desires of their own, produce meaning and have the ability to respond. Their words, their meanings, their ways and responses cannot be denied or disavowed. For words aren’t just some neutral medium of communication, but bearers of value. As such, they’re offered to others as something that comes from inside, as a gift. It is in the act of exchanging gifts, words, communicating and making alliances through marriages or in ritual confrontation, that reciprocity emerges. We engage in reciprocal relations not because we share the same values, actually or potentially, but because we need the act of sharing to transform ourselves just as we transform our environments. Alterity means that no relation with a natural environment is a one-way street. And if we must also be ready to be transformed then no place of origin, or shared account of origins, should hold moral priority. The West has no privileged moral position.

If others and their environments were incapable of meaning then our relations with them would have only one sense and direction: our way, our Western way. Their alterity itself would be meaningless, insofar as the only others that matter to us are those who, being able to hold on with constancy to some recognizable belief in the unity of God, Law and the Sovereign, can transact business with us and exchange goods and ideas on the basis of trustworthy contracts. Specifically modern legal technologies – prison, confession, mandates, interventions, contracts – are thus linked with normatively structured regimes of truth-telling inscribed in terms of skin colour, supposedly revelatory of geopolitical location and capacity. Western law thus tends towards ethnocentricity, as Twining suggested, in this very precise way.

2. There are other ways: from the Cheyenne Way to the Chilean Way

Absent from the picture of legal and political globalization that focuses on strengthening moderate liberal values in a world of global contracts and exchanges, divided between those who believe too much and those who believe too little, is the insight of anthropologists. They observe the universality of a politics of law and reciprocal relations arising not only, or not at all, from a system of exchanges of beliefs and goods, but rather from solving the problem of how to manage relations among humans, and between humans and nonhumans, in situations of meaningful alterity.

The story of the emergence of such an insight is linked to the history of contemporary anthropology itself, in its relation with law. Here we can

distinguish between three stages in that history, associated with the work of three different generations of anthropo-legal scholars. Malinowski was the single most important figure in setting the stage for the contemporary anthropological study of law, in much the same way that Lévi-Strauss is for anthropology in general. The work of the first generation – Malinowski, Lévi-Strauss, Llewellyn and Hoebel – demonstrated two things that anthropology and comparative ontology now view as self-evident: that all societies can be presumed to have a politics of law and reciprocal relations, regardless of the presence of Western trappings; and that anthropology's signature methods – field ethnography and decolonial genealogy – can be 'profitably applied to the study of law' and the management of co-productive relations between human groups and between these and nonhumans.¹¹

The work of their worthy successors – people like William Twining, Simon Roberts, Boaventura de Sousa Santos and Eduardo Viveiros de Castro – constitutes the most important contribution to the destruction of the narrow province of jurisprudence and its reconstruction on the basis of localized comparativism, decolonial genealogy and field ethnography. This second generation – including Twining – has taken the emphasis on co-production and doing/making (the focus on problems and what is done about or made through them, known in academic law as the 'case method') to its most creative conclusion: that 'being' is both making and in the making, with human groups co-producing each other as well as their environments through the invention of

¹¹ J. M. Conley and William O'Barr, 'A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology', *Law & Social Inquiry*, Vol. 29, No. 1 (Winter, 2004) pp. 179–217.

technical devices to solve common problems in concrete situations of meaningful alterity and conflict.

In this understanding, 'being' is not the result of a singular act of creation or enlightenment taking place somewhere, followed by its diffusion everywhere else through procedures of transplantation, downloading or hybridization that ultimately resemble the form of a pact or a contract.¹² Importantly, the idea of 'being' as the result of a unique act of creation followed by diffusion through consented borrowing, transplantation or downloading, invites us to think of innovation in terms of a disjunction, in space and time, between the creative moment taking place somewhere and its calculable repetition or absolutely incalculable difference elsewhere. In such a schema, consent represents the

¹² See on this W. Twining, *Human Rights, Southern Voices: Francis Deng, Abdulahi An'naim, Yash Ghai and Upendra Baxi* (Cambridge University Press, 2009). Notice, in the introduction, Twining's emphasis on Ghai's experience of postcolonial constitution-making and political materialism versus notions of a 'culture of human rights', as well as on Baxi's injunction to take suffering seriously – in fact a call for a fundamental identification to the other – in contrast to sentimental, benevolent and liberal calls for cross-cultural dialogue. For the distinction between creolization – a fundamental identification to the other, division and multiplication – and hybridity – the mere combinational (?) addition of same and other – see: E. Viveiros de Castro, *The Inconstancy of the Indian Soul. The Encounter of Catholics and Cannibals in 16-th Century Brazil* (Chicago: Prickly Paradigm Press, 2011), and Jane A. Gordon, *Creolizing Political Theory. Reading Rousseau Through Fanon* (Fordham University Press, 2014). See also B. de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Press, 2014). On decolonial genealogies, see E. Mendieta, 'Imperial Somatics and Genealogies of Religion: How We Never Became Secular' in *Postcolonial Philosophy of Religion*, P. Bilimoria and A. B. Irvine (eds), (Springer Science+ Business Media B. V. 2009), 231–46.

calculability or authorization (by the author) for repetition elsewhere in order to contain incalculability as a hazard.

On the contrary, the idea of 'being' as a process of generalized inscription and creolization suggests another answer to the question of how something other than the calculable, legal and ordered would come about, given that in principle there is nothing outside of the calculable, the legal and the ordered. The practical devices we invent in order to solve problems and conflicts (for instance, laws and rights) need to be understood not merely as formal procedures of authorization and the containment of hazardous incalculability or risk, but rather as technical actions, surfaces of inscription, or tools of technical differentiation. To explain: these are technologies that trigger different spacings, delays and rhythms. This is what legal philosopher Hans Lindahl has called borders, limits and fault lines, including, centrally, those that delimit and organize subjects and bodies into different classes, orders and races, cultures or skin colours within a collective natural or social sequence.¹³

Put more simply, this second generation of explorers of law, politics and reciprocity across cultures and natures has shown us that our social and natural bonds would be as airy as clouds if there were only contracts between individual subjects guaranteed by their mutual trustworthiness or their ability to hold on to their truth-beliefs. There are also things, technical things and objects, which stabilize our relations, and other ways to demarcate and slow down the time and place of our revolutions. Laws, legal ways and human rights exemplify such things. The next step is to better our understanding of law and its religious

¹³ See H. Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-legality* (Oxford University Press, 2013).

matrix as a political technology that produces embodied subjects and orders them, selecting some and deselecting others for the purposes of managing relations among humans and between humans and nonhumans in contexts of radical alterity.

Now, a third generation has taken such a step in the field of human rights, building on Twining's work on 'Southern Voices'.¹⁴ For some time now, he and I have been talking about the need to extend and intensify the work started in *Human Rights, Southern Voices*, in the direction of *Latin American Southern voices*. Helped by many others,¹⁵ I have been trying to do just that. The provisional results can be seen and reviewed in a trans-disciplinary trilogy that began in 2009 with the more philosophical *Being Against the World*, followed in 2010 by the ethnographic travelogue *What If Latin America Ruled the World?*, and concluding in 2013 with a narrative non-fiction work titled *Story of a Death Foretold: The Coup Against Salvador Allende, 11 September 1973*.

These works share a similar standpoint, focusing methodologically on the historical-comparative and genealogical-discursive study of institutions. This is an interpretive approach that challenges the predominance of so-called Rational Choice Theory and methodological individualism in the social sciences. It starts from the observation of a common set of problems. These stem from the persistent disavowal of objects ripe for historical comparative research across

¹⁴ W. Twining, *Human Rights, Southern Voices* (Cambridge University Press, 2009).

¹⁵ Chief among them the sociologist Boaventura de Sousa Santos, philosophers Eduardo Mendieta, Linda Martín-Alcoff, Drucilla Cornell and Lewis R. Gordon, historians Eric Hobsbawm, Marcus Rediker, Joanna Bourke and Peter Linebaugh, Brazilian anthropologist Eduardo Viveiros de Castro, Argentinian political theorist Ernesto Laclau and geneticist Yulia Kovas.

areas of the world, such as in the areas of law, policy and rights by those who insist that it is possible to do work in legal and political theory solely from the perspective of a parochial canon of Western theory and practice oblivious to its own predisposition. We can see this approach in the theories of, and practice derived from the work of, the Law and Economics school, Social Choice theorists, and cost–benefit analyses.¹⁶

The interpretive approach I espouse agrees with those exploring legal conceptions, social bonds and institutions in non-Western parts of the globe, from a wide variety of disciplines, including hard sciences such as genetics as well as the life and earth sciences, but also anthropology, the philosophy of religion and literature. From these we learn that certain epistemic disconnects, *idées fixes* and automatic reflexes add to the basic constraints already faced by transnational commentators. As the American legal ethnographer Jorge Esquirol puts it, as regards the specific case of academic law, such epistemic disconnects operate within and without academia. They ‘truncate[e] fuller debate about questions of law’ in other parts of the world, and displace ‘wider discussions over alternative policies, competing interests, and the distributional impacts of

¹⁶ See, for instance, Eric Posner’s rational choice-based approach to international relations and international law. For historical comparativism, J. Mahoney and D. Rueschemeyer, *Comparative Historical Analysis in the Social Sciences* (2003). For the compatibility between historical comparative analysis, post-structural discourse theory, discursive institutionalism and other similar approaches see M. E. Hedayat, *The Exceptionalist Collective Imaginary: Hegemonic Battles and Costa Rica’s Democratic Institutional Development*, PhD thesis submitted to the Department of Government of the London School of Economics (London: June 2014) pp. 25–40. For genealogy, see E. Mendieta, ‘Imperial Somatics and Genealogies of Religion: How We Never Became Secular’, 237–9.

rules and institutions,' privileging instead a rather narrow set of perspectives, positions and prescriptions.¹⁷

The points made in the previous paragraphs also constitute the best introductory framework for the aims of the following sections of this chapter. Like the approaches mentioned earlier (general jurisprudence, law and globalization, historical comparativism, the philosophical and scientific study of networks) and inspired by them, I shall now explore a specific case of Latin American Southern voices in the human rights context: that of the second Russell Tribunal (Russell II), assembled in the wake of the events surrounding the 1973 *coup d'état* against Salvador Allende and the Chilean Way.¹⁸

Following Twining, I believe that this specific case, adopting a historical, comparative and genealogical perspective, yields a number of crucial lessons, to be learned and applied in the construction of an alternative vision and agenda for theorizing about law, political ideas and institutions. This allows for interpretive approaches, and argues for a more careful consideration of body, place, locality and inscription (*via* concrete forms of generalized writing, archiving, marking, sequencing and transcribing) than abstract (especially probabilistic and type-sociological) models in the social sciences allow. In this spirit, it concerns itself with Latin America as a specific locality for the appearance (in speech and writing) of Southern voices in human rights. However, it does not intend to develop a full-blown case study of historical

¹⁷ J. Esquirol, 'Writing the Law of Latin America' (2009), 40 *TGWILR* 3, 694.

¹⁸ A more complete exploration of this specific case remains beyond the particular space limits of this paper.

comparison between the countries of this region or between this region as a whole and some other global grouping. The second half of this paper shares with the previously mentioned approaches, especially with Twining's *General Jurisprudence*, the thesis that most processes of 'globalization' take place at sub-global (e.g. Southern, specifically Latin American) levels and that a healthy cosmopolitan discipline of law and political theory (here including cosmopolitical philosophy) should encompass all levels of social relations and the normative orderings of such relations.

In honouring Twining's pioneering work by taking it in a hitherto ignored direction, this chapter hopes to contribute to the critical review and extension of the Western canon of jurisprudence, social theory and political philosophy. Crucially, this can be done by taking into account, as Twining did, some of the more or less general problems of conceptualization, comparison and generalization, and the relationship between the local and the global. More pointedly, it also initiates a reflection on justice, law and globalization (global social justice) from within a specific tradition. Going beyond the aim of extending the canon, it is my objective to position Latin American Southern voices in human rights not simply as an alternative 'type' – one that could or should be added to others in order to form some sort of rainbow epistemic coalition – but rather as a 'bomb'. The aim here is to explode the boundaries, borders, limits and fault lines assumed by mainstream political philosophy and legal theory.¹⁹

¹⁹ See on 'types' and 'bombs', B. Latour, 'Perspectivism, "Type" or "Bomb"?', *Anthropology Today*, vol. 25, issue, 2. Also, Eduardo Viveiros de Castro, 'The Untimely, Again', an introduction to Pierre Clastres, *Archeology of Violence*, Semiotext(e), 2010, 9–51.

3. The Chilean Way, the Inseparability Thesis and the Russell Tribunal

During a 1974 interview with the journalist Jorge Raventos, the famed Argentinian writer Julio Cortázar clarified his more general intellectual perspective. 'My standpoint,' he said, 'is that politics and ethics are inseparable.' He was responding to a question formulated by Raventos, concerning the politically critical function of writers, thinkers and academics, their militancy and activism, in the face of violence and oppression.²⁰ In the background were Cortázar's experiences as one among the group of Latin American writers and intellectuals that took part in the deliberations of the Russell II Tribunal, together with Gabriel García Márquez and Juan Bosch among others.

This citizen's tribunal considered evidence, explored the principles of the Nuremberg tribunals and used them critically in order to rule on the systematic violation of human rights, peoples' and indigenous rights in Latin America during the 1970s. Russell II had been convened in the wake of the furious violence unleashed during and after the *coup d'état* that unseated the socialist president of Chile, Salvador Allende, on 11 September 1973, and the increase in counterrevolutionary repression elsewhere in Latin America. It built, at least indirectly, on the critical heritage of the reports written by Frankfurt School lawyers and theorists for the US prosecution team during the Nuremberg Trials

²⁰ J. Cortázar and J. Raventos, 'Entrevista a Julio Cortázar', *Revista Redacción*, Junio de 1974.

and, more directly, on the legacy left behind by Jean-Paul Sartre and Bertrand Russell during the first Russell Tribunal.²¹

Russell I had condemned US intervention in Vietnam as an act of genocide on the basis of the Nuremberg principles, warning that its specific form of violence was closely connected to the demands of a global form of capitalism then under construction. Russell II extended the argument to the case of intervention in the Americas, condemning counterrevolutionary violence and the use of the 'state of siege' or 'state of exception' in countries such as Chile, Brazil, Bolivia, Uruguay, Guatemala, Haiti, Paraguay, the Dominican Republic, Puerto Rico, Nicaragua, Argentina and Colombia, which it ascribed to the defence of private, multinational commercial and financial interests. Crucially, it shifted Russell I's ethical and practical stance in favour of the least favoured towards a more militant law and politics, targeting racism, extractive neo-colonialism, the financialization of the global economy, and counterrevolutionary violence, as well as their theological-political, legal and economic justifications.²²

Such a shift, hitherto ignored by students of the culture, legality, philosophy and institutions of decolonization and resistance in the 1960s and 70s, was and remains extremely significant. On the one hand, it set the stage for a

²¹ F. Neumann, H. Marcuse and O. Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, R. Laudani, ed., with a foreword by R. Geuss (Princeton University Press, 2013). For Sartre's 'ethics of the least favoured' in the context of his participation in Russell I, his wider philosophical project and the slippage from it towards the 'ethics of the other' and the 'human rights turn' of the 1980s, see P. Arthur, *Unfinished Projects: Decolonisation and the Philosophy of Jean-Paul Sartre* (Verso, 2009).

²² See P. Arthur, *Unfinished Projects: Decolonisation and the Philosophy of Jean-Paul Sartre* (Verso, 2009).

confrontation between the anti-political ethics of abstract legality and individualistic subjectification, which would become dominant during the last two decades of the twentieth century and the first decade of the twenty-first. And on the other, it paved the way for the ethical politics and legality of militancy and desubjectification that, harkening back to the legacy of the 1960s and 70s, is carving out a space of its own on the stage of the global revolts of the second decade of the twenty-first century.

It is no accident that the flight towards an abstract ethics of disembodied humanity (often appearing as the dominant discourse of human rights) with no place and no concrete collective politics other than the constant movement of capital flows, occurred just as globalist ideology and counterrevolutionary disillusion was taking hold. Similarly, it is not by chance that the call to revisit the radical orientation of the militant politics of desubjectification, heard among student movements and emerging political sectors in the Americas, Asia and Europe, coincides with the end of 'capitalist realism' after 2008, the global revolts of 2011–13, the increase in geopolitical tensions and the backlash against neoliberalism in Latin America a little earlier.

The political ethics and legality referred to in Cortázar's clarification of standpoint, which declares that ethics, law and politics are inseparable (hereafter called the 'Inseparability Thesis') is one that takes seriously collective claims made by peoples living in suffering, under poverty, racial discrimination and socio-economic oppression. In this respect, Cortázar's Inseparability Thesis resonates with Upendra Baxi's claim in Twining's *Human Rights, Southern Voices* that human rights futures are dependent upon giving voice to suffering, as

a concrete force and effect, the result of bad history, and must therefore engage in a discourse of suffering that is militant, i.e. one 'that moves the world'.²³

Another aspect in which Cortázar's thesis, emerging from the experience of Russell II, chimes with Southern voices such as Baxi's, is on its emphasis on the historical character of injustice and justice, over and above all theodicy narratives and eschatological claims.

Cortázar argues that the collective claims and demands of those wronged by past history are the concrete basis for rights and for doing justice in the present and the future. The Inseparability Thesis considers people in their multiple nature, their motley character. It views their demands as connected to their concrete situation in history: the ways in which they have been marked, individuated, selected or deselected by more or less legally sanctioned forms of subjectification and plunder. These were the 'least favoured' identified by Sartre's reworking of the Nuremberg principles during Russell I. Moreover, the emphasis on economic exploitation at the heart of global interventionism, justified in the name of the end-history of humanity by the institutional narratives of the West, provided Cortázar and the other jurors of Russell II with an important opportunity. The legacy of Nuremberg and Russell I was connected with the plea of indigenous and other oppressed peoples, the Chilean Way, and the future of human rights in a world in which the rights of multinationals carry more weight than those of their human victims, and in that sense the post-human world of what Cortázar called 'the multinational vampires'.

²³ W. Twining, *Human Rights, Southern Voices*, 158.

The Latin American writers who participated in Russell II picked up on Sartre's point and interpreted it through the experience of what had happened in Chile. They focused on the effects of Allende's decision to nationalize natural resources – copper – until then in the hands of multinationals and the banks. Allende's policy of nationalization, which combined elements of the legal critique of the Eurocentric bias of international law with insights from the Dependency school of economics, Marxist views on mining rents derived from quasi-monopolistic positions, and decolonial views concerning financial violence in international contexts,²⁴ subscribed to the legal doctrine of 'excess profits'.

Basically, the policy targeted above-average profits obtained by beneficiaries whose unjustly acquired gains continued to appreciate in value after the perpetrators of past evils have been driven away through wars of independence, anti-slavery or anti-colonial struggle. 'Excess profits' relates also to a crucial legal problem concerning feasible schemes of reparative justice. A crucial difference between the Chilean perspective and that of the multinationals on the issue of nationalization was that for the latter this was a simple matter of compensating for predictable future losses after the takeover, while for the former the takeover was a matter of reparative justice at the heart of post-colonial legal and political institutions, based on rights of conquest and property claims. The value of compensation after takeover should thus be weighted

²⁴ See, for instance, F. Fanon, *The Wretched of the Earth* (London: Penguin Modern Classics [1961] 2009) 75–84. Making an explicit analogy with the case of reparations paid by the Germans to Israel for crimes committed by the Nazis, Fanon spoke of 'a double realisation: the realisation by the colonised peoples that it is their due, and the realisation by the capitalist powers that they must pay'. (81) Also, P. Baran and E. Hobsbawm, 'Un manifeste non-communiste', *Les Temps Modernes* 193, June 1962, 1226–61.

against the value of above-average profits obtained by current beneficiaries of past injustice.

At first, law tends towards the position that if there are good reasons to recognize historical injustice through reparations, these should be minimal and symbolic. The passage of time, issues of causality, financial viability and compounding of interest suggest these should never be taken as paving the way for restoring social justice in general. But, in Property Law, students are exposed to cases of 'adverse possession', in which the occupation of someone else's space (for instance, in the case of colonization) becomes a legal entitlement. There, the question is whether law cuts remedies off (for instance, through the prescription of a right to conquest) or allows for them (for instance, via takeovers and restitutions). Nationalization, as practiced in Chile in the 1970s in the cases of lands and mining, was but an example of backward-looking restitution, well grounded in the canon of property law by the early twentieth century. The specific case of copper nationalization was an application of legal theories of restitution according to which it would be unjust for beneficiaries of a perceived wrongdoing – e.g. under colonialism, neo-colonialism or apartheid – to keep the portion of their accumulated gains that exceeds the damages their surviving victims might claim. This would amount, as pointed out also by the Frankfurt critical reporters of the Nuremberg era, to profiting from a crime.

4. Making global social justice now

Allende's doctrine of excess profits was promulgated under Decree 92 of 28 September 1971. At the time, copper was quite profitable for US multinationals

Anaconda and Kennecott, not least because of the war in Vietnam.²⁵ In 1969, Anaconda invested 16.6% of its global portfolio in Chile, but obtained 79.2% of its profits there; Kennecott invested 13.2% and made 21.3% of its total profits there. The Chilean Decree was based on UN General Assembly Resolution 1803/1962 on 'Permanent Sovereignty over Natural Resources'. This recognized the right of peoples to recover and use their basic resources, allowing for compensation to be established in accordance with the rules of the state undertaking the nationalization and establishing the courts of that country as the appropriate venue for any resulting conflict.²⁶ Decree 92 provided for compensation and excess profit to be calculated on the basis of balance sheets available after 5 May 1955, when Law 11.828 created a Copper Department and it began recording data concerning profits. In the previous decades, copper mining companies had operated without significant regulation. Innovatively, the Decree addressed the circumstances in which benefits of past injustice have accumulated, in which the number of the original indigenous victims is ever decreasing, and in which individual victims would have difficulty proving losses on the scale of the cumulative gains that were thereby produced.

²⁵ S. Allende cited in V. Farías, *La izquierda chilena (1969–1973)* (*Documentos para el estudio de su línea estratégica* (Santiago: Centro de Estudios Públicos, 2000) 983–977 and M. Amorós, *Compañero Presidente*, 214.

²⁶ UN General Assembly Resolution 1803 (XVII), 14 December 1962. According to A. Kilangi, the resolution resulted from the UNGA's focus on 'the promotion and financing of economic development in under-developed countries ... and in connection with the right of peoples to self-determination in the draft international covenants on human rights'. At www.untreaty.un.org/cod/avl/ha/ga_1803/ga_1803.html.

Challenging Western legal common sense on the issue of just compensation and the constructive value of unjustly accrued wealth, the Allende doctrine can be seen as giving those suffering from historical grievances that persist in the global market economy the right to demand compensation now rather than later against those who tend to treat the past as a series of catastrophes repeated over time, including ours, without end or solution. For those who hold such views, 'the time of rectifying the past is never now'.²⁷ This is important insofar as such permanent delay – interregnum, to use Thomas Hobbes' terms – has been conceptualized by constitutional lawyers like Carl Schmitt in the case of Nazi Germany or Jaime Guzmán in Pinochet's Chile, as a time of exception. In such exceptional times, they argue, appealing to Roman Law and sixteenth-century justifications of colonialism (viewed through the prism of twentieth-century fascism), it is legitimate to suspend liberties and opt for the lesser evil.

Such readings of past history and precedent make a mockery of the Nuremberg Principles and the holocausts (Jewish, Spanish, indigenous, and so on). They condemn human rights futures to a form of 'transitional justice' that ultimately defends as moral the position that nothing should come (politically and legally) after doing 'just enough to achieve political stability'.²⁸ The dubious model for such a kind of justice has been, precisely, the Chilean 'transition' after the coup. Later on, that model and its economic sidekick, the trickle-down theory

²⁷ R. Meister, *After Evil*, 255–8.

²⁸ R. Teitel, 'Transitional Justice Genealogy', *Harvard Human Rights Journal* 19, 2003, 69–94; and *Transitional Justice* (Oxford University Press, 2000), also cited by R. Meister, *After Evil*, 259–76.

of economic justice, would be imported everywhere else in the world. It has become the normal state of affairs since the late twentieth century.

Transitional and trickle-down models insist that arguments of justice must disregard all past history, and that political attempts to eradicate inequality should be avoided for moral reasons: to stave off the repetition of the genocidal past. The result is an untenable separation between ethics and politics that in our time tends to be identified with standard human rights discourse and security humanitarianism. Crucially, the historicism of current human rights and security humanitarianism with respect to the sacrificial past evacuates history; it limits our awareness about particular moments of historical injustice that would inspire us to do something about it here and now, including forcing a resolution to overcome our habit of keeping what we already have at all costs.

This kind of historical awareness is the basis of remedial equality, as Baxi, Ghai and Twining, among others, explain. 'It simply assumes that most inequality is the result of past history', says human rights theorist Robert Meister, 'and that most of history was bad'.²⁹ But once we start to correct for particular moments of historical injustice, we can legitimately ask: why should we not do away with inequality altogether? 'Were we to treat material equality as both an approximation and a cap on remedial justice,' Meister argues, 'then the most disadvantaged group can legitimately desire is that its ongoing disadvantage be wiped out.'³⁰ And once we recognize that the many unequal advantages enjoyed by the beneficiaries of past injustice, such as Kennecott and Anaconda in the case of Chile, could not be justified starting now, then the obvious question becomes

²⁹ R. Meister, *After Evil*, 258.

³⁰ *Ibid.*

the one Allende asked in terms of a doctrine of excess profits: why not put law to revolutionary use? Start with the recovery of common sources of wealth, such as copper or oil, use the revenue to force a public discussion on the role of markets in society, and then, perhaps, decide that not all goods are properly valued as mere instruments of use or profit; this, of course, was the original point of the Amerindians' refusal to work and their tendency to give away their possessions.

Nowadays, we could, perhaps should, force such a discussion in the cases of knowledge and education, health, family life, nature and art. We need such a discussion, too, in the case of civil liberties or human and post-human rights and duties that attempt to regulate relations not only among humans but also between humans and nonhumans and entire ecosystems in the context of climate change. Certainly, we would agree that these things are not properly or completely valued only as commodities. The point is not so much to destroy property *tout court*, but rather the more humble one that 'some things in life are corrupted or degraded if turned into commodities'.³¹ A similar train of thought led Allende to issue his doctrine on excess profits. At its basis lies the kind of historical and existential awareness of contingency that characterized Allende's political character and attitude more generally. Such awareness accompanied also Sartre's conception of genocide in 1968, and García Márquez and Cortázar's conclusion at the end of Russell II that historical justice is optional, and that, as the former put it, the time and place comes 'where the races condemned to one

³¹ M. Sandel, *What Money Can't Buy. The Moral Limits of Markets* (Allen Lane, 2012) 10. Also, J. Cortázar, *Papeles Inesperados* (Alfaguara, 2013) 268–9, and against the widespread rejection of remedial justice on the basis that all history is irremediably catastrophic, 276 and 282–3.

hundred years of solitude will have, at last and forever, a second opportunity on earth'.³²

5. Rethinking rights for the world of multinational vampires

According to the Latin Americans taking part in Russell II, even though the US had not perpetrated the acts in Chile directly, it was privy to a broader counterrevolutionary framework that regarded all attempts to right historical wrongs and achieve remedial equality, carried out under a variety of names (liberation, Third World-ism, people's rights, democratic socialism, indigenous rights, armed struggle) as attacks against the US and its economic interests. Thus, the US government could be found guilty of all violence carried out in the name of anti-communism, with the *caveat* that the use of force directed by the Americans wasn't simply a case of Cold War paranoia, but rather responded to the economic projections of multinational corporations.

The understanding of rights was extended from the 'rights of man' to include 'people's rights', a notion that introduced into rights discourse the rules concerning permanent sovereignty over natural resources and the 'excess profits' legal doctrine, recognized by most countries in the UN General Assembly as the kernel of the project of permanent decolonization. Russell II further

³² G. García Márquez, 'La soledad de América Latina. Estocolmo, Suecia, 8 de diciembre 1982' in *Yo no vengo a decir un discurso* (Barcelona: Mondadori, 2010) 29. In that closing paragraph of his Nobel lecture, as at the outset, he refers to Allende's death. See also J. Cortázar, *Fantomas contra los vampiros multinacionales* (México: Excelsior, 1975) 58, and *Apéndice. Sentencia del Tribunal Russell II, 1974–1975*, 69–77, at 76.

declared that the American government and the multinationals had created a state of 'permanent intervention and strategic domination with the intention to assure the highest economic benefits'.³³ The general state of permanent intervention and domination referred to in Russell II had its particular instantiation in the state of exception and internal war alleged by the Chilean Junta as justification for Allende's overthrow. In fact, the widespread use of the state of exception and other forms of legal exceptionality were understood by Russell II as constituting the legal-political framework within which the 'permanent militarization' of international relations and internal politics was justified in countries like Chile or Colombia *vis-à-vis* their American neighbours.

According to the Tribunal, 'the application of such legal measures is caused by the pressure exercised on behalf of private interests ... seeking to exploit natural resources'.³⁴ The connection made by the Tribunal between the discourse of legal exceptionalism, the increasing militarization of international/internal conflicts, and economic globalization under the auspices of multinationals, is central. For it reveals the creative influence of the critical

³³ *Tribunal Russell II Sobre la situación de los países de América Latina*, appendix to J. Cortázar, *Fantomas contra los vampiros multinacionales*, México, Excelsior, 1975, 71–7. There is a recent English edition, published by Semiotext(e) in 2014. The sentence is available in digital format at www.literaberinto.com/cortazar, accessed 28 September 2012. Available also, together with other highly relevant documents, in the archives of the Leilo Basso Foundation in Rome. See also, P. W. Kelly, *When the People Awake. The Transnational Solidarity Movement, the Pinochet Junta, and the Human Rights Moment of the 1970s*, University of Chicago: Latin American History Seminar, March 2009, 35, available at www.humanrights.uchicago.edu/Baro/PatrickWilliamKelly, accessed 15 July 2014.

³⁴ J. Cortázar, *Fantomas contra los vampiros multinacionales*, 73.

language used in the 1940s by the Frankfurt legal advisers to the US team during the Nuremberg trials, combined with autochthonous discourses of permanent decolonization harking back at least to the revolutions of the nineteenth century and the legacy of indigenous resistance against conquest and colonization.

It is worth recalling that Frankfurt advisers like Otto Kirchheimer and Herbert Marcuse had seen the defence of the economic liberty of powerful agents as the root cause of the violations that had taken place during the Nazi regime. This was, precisely, the view taken by the Russell II Tribunal. For them, just as in the 1930s, the political representatives of extractive industries and capitalist interests had demanded tolerance for their intolerant positions and defended liberties that in fact sowed the seeds of exploitative oppression. From the 1970s onwards, the self-defined defenders of market liberties appealed to a quasi-theological discourse that combined religious and market libertarianism, and interpreted such liberties in the spirit of orthodox radicalism: as the natural law and order of the one true faith, and the only alternative.

In the case of Latin America, such a discourse had been inspired by the conservative and restorative ideologies of 1930s Europe, chief among them fascism and Iberian falangism. Conservative forces directed these against progressive attempts to create a social sector of the economy that could co-exist with, but also limit, the expansionist tendencies of the (globalized) private sector of the economy, while avoiding the shortcomings of a *dirigiste* public sector. In Chile, the so-called 'Social Area' would comprise the copper mining industries, nitrates, iron and coal, recently nationalized under the 'permanent sovereignty' and 'excess profits' legal doctrines. It would also include part of the finance

sector, commerce and trade, strategic monopolies, and the economic activities that conditioned social and economic development, such as energy and oil, construction, communications, paper, and transport. To operate this Social Area, alongside an area of private property and another one of mixed property, was a daunting task. It required, as Chilean jurist and Allende's chief advisor Eduardo Novoa Monreal put it, 'the invention of new blueprints for development oriented towards the construction of socialism'.³⁵

The fact that a lawyer was one of the main architects of the Chilean Way in government is not without consequence. The 'blueprint' for the creation of the Social Area was to be a legal one, put into practice under the auspices of existing domestic legal powers and the relevant rules of international law at the time. Beginning with the epoch-making UN Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, the declared equivalence between independence (or self-determination) and human and peoples' rights, based on solidarity between peoples seeking independence for the sake of a new humanity beyond the confines of national borders, centred around issues of development and economic independence. This is why it is possible to speak today of at least two fundamentally opposed traditions of human rights and internationalism emerging out of the post-war context of the first half of the twentieth century.

On the one hand, there was the position maintained in the 1950s by colonial and neo-colonial powers that they could bind themselves to human rights in a legal covenant without fear that this would mean that the UN,

³⁵ E. Novoa Monreal et al., *La vía chilena al socialismo* (México: Siglo XXI, 1973) 44.

especially its more pluralistic General Assembly, could interfere in their affairs. As a Belgian delegate put it at the time, in accordance with this position, human rights 'presuppose a high degree of civilisation ... often incompatible with the ideas of peoples who had not yet reached a high degree of development'. In accordance with statements such as this, rights should be understood as the exclusive province of developed (that is, colonial and neo-colonial, mostly Western) countries. To allow their use by underdeveloped peoples, for instance against their condition as subjects of empire or economic dependence, would be an attempt 'to lead them abruptly to the point which the civilised nations of today had only reached after a lengthy period of development'.³⁶ The link between development and rights in this view is but a repetition of the narrative that maintains that there are two sorts of people in the world and only one of them (the civilized, Judeo-Christian part) should inherit the earth and benefit from its riches. It keeps the applicability of human rights and economic independence or self-determination out of the picture, out of empire, and out of any meaningful discussion about the principles of government and global governance.

Though, at first, this was the position shared by some of the drafters of the Universal Declaration of 1948, e.g. Eleanor Roosevelt and the French jurist René Cassin, it did not prevail. A second position, beginning in the second half of the twentieth century, linked economic independence or self-determination with discourses of rights. This was a bid to take nineteenth-century ideas of the Rights of Man and the post-war construction of human rights in a more historically just

³⁶ S. Moyn, *The Last Utopia. Human Rights in History* (The Belknap Press at Harvard University, 2012) 96.

direction: to bring about a new and more inclusive humanity, which would count within it the peoples who had for so long been considered backward, or not to have reached the right degree of development. This position built on nineteenth-century examples of wider legal universalism, such as those present in the 1804 Haitian Constitution written after the slave revolution of 1801. Specifically, this position drew on the experience common to the majority of peoples in the world, that ‘under the rule of powers which regarded themselves as qualified to teach others lessons, the world had known only oppression, aggression and bloodshed’, as it was put by an Afghani delegate during the heated 1952 debates of the UN General Assembly on this issue.³⁷

A corollary of this position, developed by rights theorists and anti-racism activists in the 1960s such as Frantz Fanon, was that former and current colonial and neo-colonial powers had a duty to pay reparations to plundered peoples, and the latter had a correlative right to apply forms of remedial justice and equality at the level of global transfers of capital that resulted, and still result, from the more or less overt use of violence by such powers. In October 1963, Argentinean economist and diplomat Raúl Prebisch, a powerful presence in the UN, coined the term ‘new international economic order’ in order to refer to the concrete actions and reforms that it would be necessary to undertake at the level of the rules of international relations in order to make north–south relations more equal.³⁸ These were the ‘new blueprints for development’ referred to by Novoa Monreal in Chile in the 1970s.³⁹

³⁷ S. Moyn, *The Last Utopia. Human Rights in History*, 97.

³⁸ Edgar J. Dosman, *The Life and Times of Raúl Prebisch, 1901–1986* (Montreal, London and Ithaca: McGill-Queen’s University Press, 2008) 485–6.

6. Conclusion: voices for a human rights future in a post-human world

It is worth remembering the voices heard at the Russell II Tribunal. In the course of its deliberations, Salvador Allende's 1972 speech at the UN General Assembly on nationalization and the legal doctrine of excess profits were linked with the work of the *dependentista* economists, the Chilean and Latin American experience of the 1970s and the critical strands within the Nuremberg trials. These were brought to bear on the grim reality of a world in which a minority literally sucks the life out of the majority.

Writers like Cortázar had no illusions about the power of the Russell Tribunal or the human and peoples' rights discourse it helped to develop. In the absence of 'even a handful of [United Nations] Blue Helmets to stand between the bucket of shit and the prisoner's head', he said, it was difficult to avoid feeling that the human rights culture coming after the previous 'exceptional' emergency was simply not enough.⁴⁰ In coming to terms with what happened in Chile, the members of Russell II confronted a fork in the road. They could either go down the road of a human rights culture, prosecuting others to show that theirs is not a

See David Pollock, Daniel Kerner and Joseph L. Love, 'Raúl Prebisch on ECLAC's Achievements and Deficiencies: An Unpublished Interview' in *Revista CEPAL*, 75, December 2011, 9–22, at 19 and 21. See also S. Griffith-Jones, J. A. Ocampo and J. Stiglitz, 'Introduction' in *Time for a Visible Hand: Lessons from the 2008 World Financial Crisis* (Oxford University Press, 2010) p. I.

³⁹ Oscar Guardiola-Rivera, *Story of a Death Foretold. The Coup Against Salvador Allende, 11 September 1973* (London, New Delhi & New York: Bloomsbury) [ch. 13](#).

⁴⁰ J. Cortázar, *Fantomas contra los vampiros multinacionales*, available at www.literaberinto.com/cortazar, accessed 13 August 2012.

culture of impunity – but this was a road based on feelings of impotence, guilt about always being too late and an anxiety to pre-empt the next holocaust – or else they could go down the road that started in Nuremberg, passing through the events of 11 September 1973 in Chile. This shows the way to the future: to encourage underlings and whistle-blowers to document and question illegal orders and bad laws; to bring to justice the politically and economically more powerful; to make justice more, rather than less, urgent; not to disavow the dreams and desires of the many on which their past struggles were based; and to provide the conditions for the development of what Baxi has called ‘crimes against development’. These would be directed against the more favoured everywhere, and would establish a prosecuting counsel ready to act against old and new tyrants, including our less recognizable economic tyrants, north as well as south.

To their credit, the members of Russell II went for the second option. In the earlier part of the twentieth century it had become clear, thanks to the work of critical theorists informing the prosecution team during the Nuremberg trials, that we could not speak of Nazism (and thus also of racism) without referring to global capitalism as well.⁴¹ Similarly, thanks to the work of Southern voices such as those that gathered at Russell II in the second half of the twentieth century, we cannot think of modernity, law and globalization without considering also colonialism and the decolonial turn of the majority of the peoples of the world.

⁴¹ See F. Neumann, H. Marcuse and O. Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, R. Laudani, ed., with a foreword by R. Geuss (Princeton University Press, 2013).

Twining's Southern Voices project indicated that the majority of the peoples of the world have expressed themselves in a complex language. This language of pluralism, Third World-ism, popular coalition politics, decolonial and Southern turn, and transformative uses of law such as those made in Chile between 1970 and 1973, builds on the legacy of critical theory's involvement in the Nuremberg trials.⁴² The Inseparability Thesis that emerged from Russell II is part of that legacy of human rights and Southern Voices. It asks that the claims of peoples and the many be given more weight than those of the wealthy and the powerful. In doing so, it recognizes that, for the most part, modern history has been written by the victors and is, therefore, not only biased, false, 'tending towards ethnocentrism' as Twining put it, but also uninspiring, incapable of producing human rights futures and making history.

From the standpoint taken in this paper, inspired by Twining's Southern Voices project, the mainstream story of law in modernity is biased and false also because it hides the fact of the impotence of the powerful and their ultimate inability to impose their laws. As Eduardo Mendieta says, echoing the best of contemporary critical theory and the Southern turn of people like Twining and de Sousa Santos, 'modernity is the Aesopian name for a violent historical process in which colonialism, genocide, and ecocide went hand in hand with two other fundamental processes: the spiritual conquest of the peoples to be subjugated, and what we can call epistemic gerrymandering'.⁴³ Conversely, the fable of law

⁴² See n. 11. See also U. Baxi, *Human Rights in a Post-human World: Critical Essays* (Oxford University Press, 2009).

⁴³ E. Mendieta, 'Imperial Somatics and Genealogies of Religion: How We Never Became Secular' in *Postcolonial Philosophy of Religion*, P. Bilimoria and A. B. Irvine (eds), 231. He refers to the cartographies, cosmographies and other

and modernity tells a tale that dismisses the actions of those who are attaining existence and liberty, and ‘who prove every day, precisely, that the greatest power in the world is incapable of imposing its laws’, as Sartre put it.⁴⁴

If the writing of modern Western legal theory and history has at least contributed to maintaining the conditions of non-existence of the peoples of the non-Western world, then in different but related ways, Sartre, the writers of Russell II, Twining, de Sousa Santos, Mendieta and others are describing the fable of modernity as a process of inscription, individuating people, selecting some and deselecting others from a more integral unity of humanity. But these people in turn seek to negotiate, escape from and radically transform the laws imposed upon them, all the while transforming themselves.

technical graphs and processes of inscription (from grammar to money) described by W. Mignolo in his *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (The University of Michigan Press, 1995).

⁴⁴ J.-P. Sartre, *Il n’y a plus de dialogue possible*, 18–19.